

[JULY 1. 1766.]

A N S W E R S

F O R

John Fobson Merchant in *Dundee*, Trustee
for *William Hay*, Son of the deceased
William Hay late Factor to the Earl of
Rothes, and *Margaret Fairlie*, Relict of
the said *William Hay*;

T O T H E

PETITION of Captain *Robert George*
Bruce of *Bunzion*.

FROM the way in which this case is stated in the petition, your Lordships would be apt to imagine that some mistake had happened, either in pronouncing or clerking the interlocutor under review. But, in fact, your Lordships were unanimous in giving that decision, and the cause was remitted to the Lord Ordinary to apply it, by adjudging and decerning against the petitioner for the sums therein mentioned; the justice of which the respondent thinks he will have no difficulty of supporting.

The petitioner talks of an *original* claim secured by the inhibition, and of an after and *separate* claim of deburse-

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ments which could not fall under the inhibition, or militate against a singular successor. This is a separation which is made only in the petition, and which the nature of the transaction does not admit of; as from the following state of the case will appear.

Sept. 14.
1732. Patrick Bruce of Bunzion and William Hay, who had become bound as cautioners for John Clark in the original debt to John Preston of Prestonhall, did, of this date, grant their joint bond of corroboration for the accumulate sum of L. 2010 : 15 : 0 Scots, with interest from Lammas 1732, to James Preston, assignee of the original creditor.

On the 24th August 1750, letters of inhibition were raised and executed at the instance of Mr Robert Preston the then creditor, against Patrick Bruce of Bunzion, upon the said bond of corroboration; and the inhibition and executions were duly registrate; and at the time of serving this inhibition, the whole principal sum, and a considerable part of the interest, was resting unpaid.

Upon William Hay's death, his widow Margaret Fairlie who represented him, did, in concurrence with Patrick Bruce, employ the now deceased Mr William Garden to attach the subjects of John Clark the original debtor, and to recover what he could from his estate and effects, in order to be applied towards payment of the creditor, and to their relief *pro tanto* of the engagement. Accordingly, by the assiduity of Mr Garden, who carried on various processes and diligences against Clark and his other creditors for a course of years, there was recovered out of his estate and effects, prior to the 15th July 1757, the sum of L. 229 : 6 : 4 Sterling, the recovery whereof cost an expence of L. 83 : 3 : 0 Sterling, as appears from the accompt in process: And as Mr Garden happened at the time to have money in his hands belonging to Mrs Hay, so he applied the whole L. 229 : 6 : 4, recovered out of Clark's effects, in extinction *pro tanto* of the debt owing to Preston, without deducing the expence of recovery; which

which he might, and certainly would have done, if he had not had other funds belonging to Mrs Hay in his hands, which he thought would answer for payment of his accompt. Whence it is evident, that though L. 229 : 6 : 4 of the debt owing to Preston, and secured by the inhibition, was to appearance paid out of Clark's funds; yet, in fact, the neat sum recovered and paid out of Clark's effects, was no more than L. 146 : 3 : 4; and the other L. 83 : 3 : 0 was a sum applied by Mr Garden, out of Mrs Hay's money, in further extinction of her share of the debt.

On the 20th December 1757, and 20th July 1761, there was further recovered and paid to the creditor, out of Clark's subjects, L. 31 : 13 : 10. These payments of L. 146 : 3 : 4, L. 83 : 3 : 0, and L. 31 : 13 : 10, reduced the debt in the bond of corroboration to L. 119 : 12 : 4 Sterling of capital, on the 20th July 1761.

John Jobson who had acquired right to the debt and diligence from Mr Robert Preston, did, on the 4th August 1762, transfer and assign the said balance, and interest thereof from the said 20th July 1761, with a proportional part of the penalty in the bond of corroboration effeiring thereto, together with the bond of corroboration itself, original bonds, inhibition, and other diligence which had followed thereon, to William Hay, son of the said deceased William Hay, in behalf of the widow his mother, upon his making payment to him of the aforesaid balance, with interest from the 20th July 1761, and L. 6 : 7 : 1 of expences of diligence, amounting, all together, to L. 132 : 5 : 6.

It appears that, in 1758, Patrick Bruce the co-cautioner in this debt, and against whom the inhibition was executed in the 1750, disposed his estate to his second son Lieutenant George Bruce, upon the narrative of the said Lieutenant Bruce's having paid him *a certain sum of money*, with
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the burden of a liferent-provision in favour of his spouse; and the Lieutenant has possessed the estate ever since.

In 1764 William Hay, after having acquired right to the debt and diligence from Jobson, brought the present process of adjudication, in his cedent's name, against Frederick Rudolph Bruce, eldest son and heir of the said Patrick Bruce, for adjudging the estate of Bunzion in payment of the said L. 119 : 12 : 4 remaining due on the bond of corroboration, with interest from 20th July 1761, and a proportional part of the penalty corresponding thereto; and he likewise repeated a reduction of the said disposition, by the said Patrick Bruce to his second son George Bruce, *ex capite inhibitionis*. The summons, as raised in Jobson's name, concludes for payment of the whole; and there is no doubt that the whole of the above remaining balance, with annualrent and penalty, is secured by the inhibition. But Mrs Hay and her son having no intention to demand more than they are justly intitled to from the co-cautioners estate, did agree to restrict their claim as follows.

The principal sum in the bond of corroboration is L. 2010 : 15 : 0 Scots; in Sterling

Annualrents arising thereon
Expences paid to Jobson

L. 167	11	3
219	7	4
6	7	1
Total	L. 393	5 8

Which

Which was paid in this manner.

By cash received from Clark the				
principal debtor's funds	L. 229	6	4	
Item, more	31	13	10	
Total sum received from Clark's				
funds	261	0	2	
Deduce expences in recovering				
thereof	83	3	0	
Remains neat sum recovered				
from Clark's funds				177 17 2
Sum advanced by Mr Garden	83	3	0	
Sum paid to Jobson by William				
Hay, for Mrs Hay	132	5	6	
Sum				
	215	8	6	
Total, as above				
	393	5	8	

The claim therefore of Mrs Hay and her son is as follows. One half of the said L. 215 : 8 : 6, including as well the sum paid by Mrs Hay to Jobson as the sum advanced by Mr Garden, with interest of the former sum from 9th August 1762, and of the latter sum from 19th July 1757: Or, in other words,

The half of L. 132 : 5 : 6	L. 66	2	9
Interest thereof from 9th August 1762 to			
Martinmas 1764	7	9	3
The half of L. 83 : 3 : 0	41	11	6
Interest from 19th July 1757 to Martinmas			
1764	15	4	7
Total due at Martinmas 1764			
With a proportional part of the penalty	L. 130	8	1

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This claim falls short of the whole balance secured by the inhibition, which is as follows.

To principal sum	L. 119	12	4
Interest from 20th July 1761 to Martinmas 1764	19	18	6½
Besides a proportion of the penalty.			
	L. 139	10	10½

July 17. 1765. The cause having come before the Lord Stonefield Ordinary, his Lordship, at first, by interlocutor of this date, upon advising memorials, "sustained the reasons of reduction *ex capite inhibitionis*, and adjudged, decerned, and declared for payment of the aforesaid sum of L. 130 : 8 : 1, "with interest from Martinmas 1764."

Against this interlocutor Captain Bruce represented, and insisted, That as he was an onerous purchaser, he could only be made liable for one half of the balance struck at by the inhibition, which he explained to be one half of the sum remaining due to the creditor at the date of his assignation to Mrs Hay, without any regard to the L. 83 : 3 : 0 advanced by Mr Garden. The Lord Ordinary, on advising this representation, with answers, pronounced an interlocutor making a variation, which neither party agreed to; and, upon advising mutual representations, his Lordship, Jan. 28. 1766. of this date, pronounced an interlocutor which finds, "That the inhibition founded on by the pursuer is only available to secure that part of the debt on which it proceeded which remains unpaid out of the funds of the principal debtor Bailie Clark, the interest due thereupon, and a proportional part of the penalty; but not to secure the expences laid out in recovering the funds of the principal debtor, which were applied in part payment of the debt or other expences. Alters the former interlocutor; and " finds

“ finds there is resting and owing to the pursuer, as trustee
 “ for William Hay, the sum of L. 59 : 16 : 2 Sterling, be-
 “ ing one half of the debt remaining due, with the interest
 “ thereof from the 20th of July 1761, and a proportional
 “ part of the penalty; and adjudges, decerns, and declares
 “ against Frederick Rudolph Bruce *cognitionis causa*.”

The respondents submitted this interlocutor to the review of your Lordships, and pleaded, *1mo*, That there was no sufficient evidence of Captain Bruce's being an onerous purchaser. *2do*, That the pursuers were demanding no more from him than the sums secured by the inhibition, or rather not so much; and that the L. 83 : 3 : 0, advanced by Mr Garden out of the money of one of the co-cautioners, was not a separate claim; but, as it was paid wholly by Mrs Hay, it could only have the effect of diminishing her share of the debt, and the inhibited person, or, which is the same thing, his lands, remained still affected with the same proportion as if that part of the debt had not at all been extinguished, as he could take no benefit from the payment made by Mrs Hay. *3tio*, That the disbursements made by Mr Garden were at least *in rem versum* of the defender as well of the pursuers; and that he could not take benefit from the payments which had been made out of the common debtor's effects, without being liable in a proportion of the expence incurred in recovering these payments.

And the prayer of the petition was in these words:
 “ May it therefore please your Lordships to alter the last in-
 “ terlocutor of the Lord Ordinary, and upon one or all of
 “ the grounds above mentioned, to adjudge, decern, and de-
 “ clare for payment of the sums to which the petitioner
 “ has restricted his claim, viz. L. 66 : 2 : 9, with interest
 “ thereof from 9th August 1762, and L. 41 : 11 : 6, and
 “ interest from 19th July 1757, and a proportional part of
 “ the penalty libelled.”

Your

March 6.
1766.

Your Lordships were unanimously of opinion, that the sums to which the claim was restricted being less than those secured by the inhibition, the pursuers were intitled to decree in terms of the prayer of the petition; and therefore you pronounced the interlocutor now under review, which finds, " That there is resting and owing to the petitioner, " as trustee for William Hay, the sums to which he has restricted his claim, viz. the sum of L. 66 : 2 : 9 Sterling, " and interest thereof from the 9th August 1762; and also " the sum of L. 41 : 11 : 6 Sterling, and interest thereof " from the 19th day of July 1757, both till payment, and " a proportional part of the penalty libelled; and remit " to the Lord Ordinary in the cause to proceed accordingly."

The respondents cannot observe any mistake or omission in this interlocutor, further than that your Lordships might not only have *found*, but also have *adjudged* and *decerned*. But as you remitted to the Lord Ordinary to proceed, the respondents did understand the meaning of this remit to be, that the Lord Ordinary was to adjudge in terms of the finding; and there cannot be a doubt that the meaning of the court was, to alter the Lord Ordinary's interlocutor, and to decern against Captain Bruce, and against his estate, for the sums which the respondents claim as still due to them.

The petition now offered for Captain Bruce proceeds, from beginning to end, on this fallacy, that the respondents are here claiming something different from what was secured by the inhibition. The debt, says he, was reduced, on the 20th July 1761, to L. 119 : 12 : 4. For this sum only, with the interest and a proportion of the penalty, was decree of cognition obtained; for this sum only could the petitioner's estate be adjudged; for this sum only was the reduction repeated *ex capite inhibitionis*: And as the pursuer William Hay's title can be no broader than Jobson's, from whom he derives right, he cannot be allowed to bring under the inhibition a separate accompt of expences debursed by
Mrs

Mrs Hay's doer in recovering the subjects of the common debtor, so as to affect him an onerous purchaser of his father's estate.

It is answered, That supposing him to be an onerous purchaser, which the respondents take the liberty of disputing, he is in a mistake in arguing as if any thing further were here demanded from him than what was secured against the estate by the inhibition. It has already been shown, that the balance of principal and interest remaining due of the debt secured by the inhibition at Martinmas 1764 amounts to L. 139 : 10 : 10½; whereas the total sum of principal and interest, at that term demanded by the respondents, is only L. 130 : 8 : 1. To the extent of this sum there is no doubt that the estate of Bunzion was liable to Jobson the creditor; and as the respondents William Hay and his mother are in the right of Jobson, there seems to be as little doubt that their claim stands good against the estate to the same extent. The petitioner affects to consider this claim as made against himself personally, and says, That as a singular successor he has nothing to do with it. But your Lordships will observe, that the claim is against the estate, and only against him consequentially as holding the estate. The question is, To what extent was the estate of Bunzion liable for payment of this debt when in possession of the father? It was clearly liable to a greater amount than the sum now claimed; and were the father still alive, and the estate his property, the inhibition which has been acquired by the respondents would remain in full force against him till every farthing of the sums now acclaimed was recovered from him. How then can it be doubted, that the present defender, supposing him to be a singular successor, must also pay the whole of this money before the estate be relieved?

The respondents do not plead, that a singular successor of the inhibited person can be made liable in a debt afterwards
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contracted, which does not fall under the inhibition. He only demands, that the estate of the inhibited person should be made liable in that part of the debt on which the inhibition was used, which the inhibited person still owes. It is true, that by the payments made by Mr William Garden the debt was reduced, as at Martinmas 1764, to L. 139 : 10 : 10 $\frac{1}{2}$. But the petitioner is in a mistake in thinking that the proportion payable by him of this balance is only one half; for it will be observed, that the payments were made by Mr Garden, partly out of a common fund, and partly out of the proper money of Mrs Hay, L. 83 : 3 : 0 of it being paid out of Mrs Hay's money. In considering, therefore, who is liable for the balance, it is plain, that the defender and Mrs Hay are not liable, each of them, in a half. But the defender is liable in L. 83 : 3 : 0, with the interest, more than Mrs Hay; because Mrs Hay did formerly pay L. 83 : 3 : 0 more than the defender. So that your Lordships will consider the whole of this present claim against the defender as a claim for his proportion of the original debt which was the foundation of the inhibition. The respondents do not set up this accompt of debursments as a separate claim or ground of debt against the inhibited person. But they say, that, in considering to what extent his estate is affected for payment of the original debt, this sum must enter into the computation; and that the share which he falls to pay of the original debt must in proportion be enlarged.

The expences incurred in recovering Clark's funds fell of course to be deduced out of the first end of the money so recovered; and if Mr William Garden, because of his having Mrs Hay's money in his hands, thought proper, in place of making the deduction, to pay the L. 83 : 3 : 0, as well as the neat balance recovered, this can be considered in no other light, than as a further payment made by him out of Mrs Hay's separate funds, to diminish her share of the balance

lance *pro tanto*; but which ought not to diminish Bruce of Bunzion's.

It is impossible that either Bruce of Bunzion, or the defender, can plead upon the payments made by Mr Garden in extinction of the debt, and of the inhibition following on it, unless in so far as they had an interest in the money thus paid. The fact is, that Mr Garden did first and last uplift L. 261 : 0 : 2 out of the effects of Clark. But *queritur*, To what extent had Bruce of Bunzion an interest in that sum, or the application of it? It is plain, that he had only an interest in the one half of it, deducing the half of L. 83 : 3 : 0, the expence of recovery. Patrick Bruce could not therefore have compelled Mr Garden to have paid over the whole of this money, or even the half of it, to the creditor; he had only a right to make him apply one half of it, deducing one half of the expence of the recovery; and therefore to that extent only can his son plead on the payments made by Mr Garden, as an extinction of the debt and inhibition.

To illustrate this, let it be supposed, that this money had been recovered from Clark's estate, upon another and separate ground of debt due by Clark to William Hay, and paid in by his agent to satisfy the creditor in the inhibiting debt; it surely could not have been maintained, that the inhibition was thereby so far extinguished, as to debar William Hay the co-cautioner from taking an assignation to it, in order to operate his relief as to the one half out of the estate of Bunzion.

Now as Mr Garden, without retaining his L. 83 : 3 : 0 of expences, applied that sum along with the rest of the money recovered from Clark's funds, he was intitled to demand, and unquestionably would have demanded from the creditor, an assignation to the debt, and inhibition thereon, to that extent, for further security of his accompt, had he not been possessed of Mrs Hay's separate funds. Mrs Hay, in accompting with Mr Garden, gave him allowance of said
L. 83 :

L. 83 : 3 : 0, whereby she came in his place ; and as he was intitled to demand, so she did demand, and has accordingly got an assignation in her trustee's name to the inhibition ; and therefore it is apprehended her claim for relief of the one half thereof out of the estate of Bunzion is equally well founded as Mr Garden's would have been for the whole, had he taken an assignation in his name.

Upon these principles, your Lordships were unanimous, when the cause was last advised, that the respondents fell to have decreet of adjudication for the whole sums claimed by them ; and indeed the plea maintained by the petitioner is a most unjust one. He takes credit for the payments made out of Clark's funds, in order so far to disincumber his estate of the inhibition ; and yet he will not allow his share of the expence necessarily incurred in making these funds effectual. It is plain, that if Clark's subjects had not been preserved and converted into money by Mr Garden, at the request of Mr Hay the co-cautioner, this defender would have had the half of the whole debt due by the bond of corroboration, and interest thereof, to pay, which would have amounted to more than double the sum now claimed against him ; but, by the payments made, the interest was kept down, and a great part of the principal sum extinguished ; so that, even upon the common principle of *in rem versum*, he ought to be found liable.

The more especially, as it is by no means a clear point, that he is an onerous singular successor to his father's estate. He is in possession of the estate, upon a disposition bearing a general narrative of onerous causes ; but he has never yet been pleased to condescend on the price paid ; and as he is, in the eye of law, a conjunct and confident person, your Lordships will not incline to sustain a narrative of that kind as sufficient proof *per se* of the onerous cause, to the disappointment of lawful creditors. The eldest son of Patrick Bruce renounces to be heir ; and it cannot be discovered that
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he left any other funds, except the estate of Bunzion, which is in possession of this defender the second son.

He says, That when he purchased the estate from his father, he retained only L. 40 to answer his father's share of this debt. Of this, however, there is no evidence; and the fact is extremely improbable. He saw an inhibition on record to the full extent of the debt; and he took the estate burdened with this incumbrance. It is to be supposed, therefore, that he retained in his hands to the full extent of it, as he could not but see that there was a possibility of his being liable for the whole; or, at least, if he neglected to keep a fund in his hands sufficient to answer all that could be demanded of him in virtue of the inhibition, he has himself only to blame.

For these reasons, it is not doubted, that your Lordships will adhere to your interlocutor; and that you will either adjudge and decern in terms thereof, or of new remit to the Lord Ordinary to do so.

In respect whereof, &c.

ILAY CAMPBELL.

July 1, 1907

Received of the Treasurer of the State of New York

the sum of \$100.00

for the purchase of the State of New York

for the purchase of the State of New York

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